

THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILD FISH CONSERVANCY, et al.,

Plaintiffs,

vs.

NATIONAL PARK SERVICE, et al.,

Defendants.

No. 3:12-CV-05109-BHS

AMICUS CURIAE LOWER ELWHA KLALLAM
TRIBE'S NOTICE RE HATCHERY RELEASES
AND RELATED APPELLATE PROCEEDINGS

Amicus curiae Lower Elwha Klallam Tribe files this notice to address any suggestion that the timing of the release of native Elwha River coho salmon from the Tribe's fish hatchery was related to this litigation. Any such suggestion is patently false. The coho release began on Monday, March 24, 2014, and was predicated entirely on scientific conditions. *Second Declaration of Larry Ward*. At that time, the fish were of optimal size and coloration, and the fish were displaying smolting behavior, including swimming in search of an exit from the hatchery ponds. *Id.* The Fish Health Specialist at the Northwest Indian Fisheries Commission recommended to the Hatchery Manager that the fish be released at this time. *Id.* Conditions in the Elwha River also dictated this release date. As of March 24, 2014, the turbidity in the river was relatively low (that is, the level of suspended sediments that are lethal to juvenile fish) and was expected to remain low for the rest of the week. *Id.* In sum, the fish were

1 released at the scientifically appropriate time, consistent with the NMFS-approved HGMP. Following
2 the Court's March 26, 2014 order, undersigned counsel contacted the Hatchery Manager to determine
3 the status of the coho salmon releases and promptly shared this information with all counsel.
4 Undersigned counsel also expressed the willingness of amicus curiae Lower Elwha Klallam Tribe to
5 discuss remedy-related issues with Plaintiffs and Federal Defendants.

6 By way of further background, on January 23, 2014, Plaintiffs moved for a preliminary
7 injunction against the dismissed Tribal Defendants to enjoin or reduce the 2014 release of native Elwha
8 River steelhead (releases which have occurred each of the past three years without objection) and native
9 Elwha River coho salmon (which likewise have occurred for many years without objection). Dkt. 180.
10 On March 12, 2014, the Court declined to consider Plaintiffs' motion because it was directed at non-
11 parties dismissed well over a year ago for lack of subject matter jurisdiction. Exhibit 1 at 3:18—21
12 ("The plaintiffs are seeking this injunction against defendants that, again, are no longer in the case, and
13 the Court's not going to accept the invitation here to reconsider its order dismissing the [Tribal]
14 defendants."); *id.* at 40:21—24 ("Well, again, the Court is not going to reconsider its motion with regard
15 to dismissing the [Tribal] defendants, and therefore the Court's without jurisdiction to enjoin people
16 who are not parties here."). The Court also denied Plaintiffs' oral motion to enjoin the releases pending
17 appeal. *Id.* at 41:10—16.

18 Plaintiffs appealed the Court's decision on March 13, 2014. Dkt. 186. In doing so, Plaintiffs
19 transferred to the Court of Appeals for the Ninth Circuit jurisdiction over Plaintiffs' request for
20 preliminary injunctive relief against the dismissed Tribal Defendants to enjoin the release of coho
21 salmon and steelhead, and divested this Court of such jurisdiction. *E.g., Townley v. Miller*, 693 F.3d
22 1041, 1042 (9th Cir. 2012). On March 17, 2014, a full week before the coho releases began, Plaintiffs
23 notified counsel that they would *not* ask the Ninth Circuit to enjoin the March release of coho salmon.
24 Exhibit 2. On March 21, 2014, Plaintiffs filed in the Ninth Circuit an emergency motion for injunction
25

1 pending appeal to enjoin the April release of steelhead, roughly scheduled for the week of April 14,
 2 2014. Exhibit 3. The dismissed Tribal Defendants' response to that motion is due Monday, March 31,
 3 2014, and Plaintiffs have requested a ruling from the Ninth Circuit no later than April 10, 2014.

4 Plaintiffs and Federal Defendants previously stipulated in writing, and orally at the March 12,
 5 2014 hearing, to file written briefs addressing the question of remedies following this Court's order on
 6 the parties' cross motions for summary judgment. Plaintiffs' proposal for a telephonic motion for a
 7 preliminary injunction (a procedure not contemplated by the federal or local rules of procedure), Dkt.
 8 192 at 5, would be an improper use of the parties', amicus curiae's, and the Court's resources,
 9 particularly given that jurisdiction over these issues lies with the Ninth Circuit, where Plaintiffs have a
 10 motion pending that seeks the same injunctive relief.

11 DATED this 28th day of March, 2014.

12
 13 Respectfully submitted,

14 s/ Cory J. Albright

15 s/ Jane G. Steadman

16 Cory J. Albright, WSBA # 31493

17 Jane G. Steadman, WSBA # 44395

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25 Counsel for Amicus Curiae Lower Elwha Klallam Tribe

s/ Stephen H. Suagee

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Attorney for Amicus Curiae Lower Elwha Klallam Tribe

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2014, I electronically filed the AMICUS CURIAE LOWER ELWHA KLALLAM TRIBE'S NOTICE RE HATCHERY RELEASES AND RELATED APPELLATE PROCEEDINGS and the SECOND DECLARATION OF LARRY WARD using the CM/ECF system, which will send notification of the filing to all parties in this matter who are registered with the Court's CM/ECF filing system.

DATED this 28th day of March, 2014.

s/ Cory J. Albright

Cory J. Albright, WSBA # 31493

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Counsel for Amicus Curiae Lower Elwha Klallam Tribe

EXHIBIT 1

1 UNITED STATES DISTRICT COURT
 2 WESTERN DISTRICT OF WASHINGTON
 3 AT TACOMA

4 WILD FISH CONSERVANCY, et al.,) Cause No. C12-5109BHS
 5 Plaintiffs,)
 6 v.) Tacoma, Washington
 7 NATIONAL PARK SERVICE, et al.,) March 12, 2014
 8 Defendants.)
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10
 11 TRANSCRIPT OF HEARING
 12 BEFORE THE HONORABLE BENJAMIN H. SETTLE
 13 UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

15 For the Plaintiffs: BRIAN A. KNUTSEN
 16 Smith & Lowney, PLLC
 17 917 Southwest Oak Street, Suite 300
 18 Portland, Oregon 97205

19 CLAIRE TONRY
 20 Smith & Lowney PLLC
 21 2317 E. John Street
 22 Seattle, Washington 98112

23 For the Federal
 24 Defendants:

25 CARTER HOWELL
 U.S. Department of Justice
 Environment & Natural Resources Division
 100 Southwest Third Avenue
 Portland, Oregon 97204-2902

JOSEPH T. MATHEWS
 U.S. Department of Justice
 Environment & Natural Resources Division
 P.O. Box 7611
 Washington, DC 20044

1 MR. HOWELL: Good morning, Your Honor. Carter Howell
2 on behalf of federal defendants. With me today is Joseph
3 Mathews.

4 THE COURT: Good morning.

5 MR. ALBRIGHT: Good morning, Your Honor. Cory
6 Albright on behalf of the dismissed tribal defendants. Along
7 with me are Jane Steadman from my office, as well as general
8 counsel of the Lower Elwha Klallam Tribe, Stephen Suagee.

9 THE COURT: Good morning.

10 Well, this matter has been set for a hearing on the
11 cross-motions for summary judgment, and the plaintiffs are
12 seeking a preliminary injunction to direct the Elwha
13 defendants from releasing the proposed quantity of hatchery
14 steelhead and coho salmon smolt into the Elwha River or its
15 tributaries, or in the alternative to reduce releases to
16 50,000 each species; and secondly, to prevent the proposed
17 steelhead broodstock collection activities.

18 The plaintiffs are seeking this injunction against
19 defendants that, again, are no longer in the case, and the
20 Court's not going to accept the invitation here to reconsider
21 its order dismissing the defendants.

22 Having said that, the Court intends to render a decision
23 here on the cross-motions within a few days, and if the
24 plaintiffs prevail, then it seems to the Court that the
25 permits upon which the Elwha defendants intended to proceed to

1 this case is to strike the motion as improvidently filed
2 against tribal defendants.

3 The other procedural issue that I would raise is that the
4 plaintiffs had an opening brief, a reply brief, and at oral
5 argument, for the first time, we are hearing this request for
6 relief of an extension of time. Procedurally you can't change
7 your request for relief at oral argument on the motion. If
8 they wanted that, they should have put it in their opening
9 motion, or at least raised it in their reply. They chose not
10 to do so.

11 The final issue, and it goes to the fish, Your Honor. The
12 timing, what happens with juveniles in a holding facility is
13 that they start the smoltification process, and when they
14 reach a certain level, the fish go. That's why the hatchery
15 operators know when to release them.

16 If they begin to smolt and you hold them too long, it is
17 not good for the fish, and in many cases you have to destroy
18 those fish. So there are some equities involved beyond the
19 procedural issues that we're just now hearing for the first
20 time.

21 THE COURT: Well, again, the Court is not going to
22 reconsider its motion with regard to dismissing the
23 defendants, and therefore the Court's without jurisdiction to
24 enjoin people who are not parties here.

25 MR. KNUTSEN: May I respond, Your Honor?

1 THE COURT: Yes.

2 MR. KNUTSEN: Just to be clear -- maybe I wasn't
3 entirely clear. What we're requesting here is not different
4 relief in association with the pending preliminary injunction
5 motion. We are filing -- making a new motion here today,
6 orally requesting that the Court issue an injunction pending
7 appeal. And regardless of whether the Court is inclined to
8 strike the motion for preliminary injunction or deny it --

9 THE COURT: Enjoining the federal defendants?

10 MR. KNUTSEN: No, sir. Imposing an injunction
11 against the hatchery operators. Regardless of whether the
12 Court is inclined to strike the pending preliminary injunction
13 motion or deny it, the plaintiffs, nonetheless, are making a
14 motion here today for an injunction pending appeal as properly
15 provided under the rules of procedure.

16 THE COURT: The motion is denied.

17 MR. KNUTSEN: Thank you.

18 THE COURT: Are there any other matters to come
19 before the court?

20 All right. We will be in recess.

21 THE CLERK: All rise.

22 (Above hearing concluded.)
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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

/s/ Julaine V. Ryen
JULAIN V. RYEN

March 14, 2014
Date

EXHIBIT 2

Cory Albright

From: Brian Knutsen <briank@igc.org>
Sent: Monday, March 17, 2014 1:34 PM
To: 'Steve Suagee'; 'Cory Albright'; 'Howell, Coby (USAOR)'; matthew.littleton@usdoj.gov; 'Mathews, Joseph (ENRD)'
Cc: rasmithwa@igc.org; elizabethz@igc.org; 'Claire Tonry'; 'Brian Knutsen'
Subject: Wild Fish Conservancy, et al. v. National Park Service et al.; 9th Cir. No. 14-35196

Counsel,

Plaintiffs-Appellants in this matter intend to file an emergency motion for an injunction pending appeal under Circuit Rule 27-3. The motion will only address the proposed release of steelhead to occur this April. Plaintiffs will request action on the motion by April 10. I do not yet know when the motion will be filed, but Plaintiffs are endeavoring to file it as soon as possible. The Ninth Circuit has been notified of this matter.

I request that you consider whether the parties should stay or extend the current briefing schedule set for this appeal (not for the emergency motion). It seems likely that the district court will enter a final judgment in this matter before the actions subject to the appealed preliminary injunction decision resume—before next year's releases and steelhead broodstock collection. Please let me know your thoughts on this proposal.

Thank you, Brian.

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EXHIBIT 3

Appeal No. 14-35196

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILD FISH CONSERVANCY, *et al.*,

Plaintiffs-Appellants,

vs.

NATIONAL PARK SERVICE, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the
Western District of Washington Case No. 3:12-CV-05109-BHS

**PLAINTIFFS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT
RULE 27-3 FOR INJUNCTION PENDING APPEAL
(ACTION REQUESTED BY APRIL 10, 2014)**

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Attorneys for Plaintiffs-Appellants

Plaintiffs assert that the National Environmental Policy Act (“NEPA”) requires that an environmental impact statement (“EIS”) be prepared fully evaluating the hatchery strategy proposed to restore salmonid populations to the newly-opened Elwha River watershed and alternatives to that approach. Plaintiffs believe that such an EIS is essential to inform decision-makers and the public of the risks and benefits associated with the proposed course of action and alternatives thereto *before* this nationally- and internationally-significant project is implemented.

Plaintiffs respectfully request the Court issue an order pending appeal enjoining the release of hatchery steelhead proposed to occur this April to prevent irreparable injury to threatened salmonids. Alternatively, Plaintiffs request the Court order a reduction in this release to no more than 50,000 steelhead. Such a release would continue to supply the hatchery’s broodstock—thereby ensuring against any perceived risk of extirpation—while greatly reducing the irreparable harm inflicted on threatened salmonids. Specifically, Plaintiffs request an order pending appeal directing the Hatchery Managers to take such actions as are necessary to prevent the release of hatchery steelhead into the Elwha River or its tributaries, or, alternatively, to reduce such release to 50,000 steelhead.

The record includes contradictory statements regarding when this release is to occur. However, counsel for the Hatchery Managers has indicated that the

release is to occur “roughly on April 15th.” Accordingly, Plaintiffs respectfully request resolution of this motion by April 10, 2014.

III. Notification of Counsel to Other Parties.

On March 17, 2014, I notified the following attorneys of Plaintiffs’ intent to file this motion: Stephen Suagee and Cory Albright (attorneys for the Hatchery Defendants) and Matthew Littleton, Coby Howell, and Joseph Mathews (attorneys for the Federal Defendants).

IV. District Court Disposition.

All grounds advanced in support of this motion were submitted to the district court. All materials submitted in support of this motion except for the Declaration of Dr. Jack Stanford and the Declaration of Dr. Gordon Luikart were before and cited to the district court and are already in the possession of the parties.

Declarations substantially similar to the Declaration of Dr. Jack Stanford and the Declaration of Dr. Gordon Luikart were submitted to the district court. The district court denied Plaintiffs’ motion for a preliminary injunction and Plaintiffs’ motion for an injunction pending appeal during oral argument held March 12, 2014.

DATED this 21st of March, 2014.

s/ Brian A. Knutsen
Brian A. Knutsen, WSBA No. 38806
Attorney for Plaintiffs-Appellants

RESPECTFULLY SUBMITTED this 21st day of March, 2014.

By: s/ Brian A. Knutsen

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